TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILSHIRE OIL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 30, 1938

CERTIORARI GRANTED APRIL 3, 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILSHIRE OIL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPEARANCES

For Taxpayer:

GEO. BOUCHARD, Esq.,
JOSEPH D. BRADY, Esq.,

For Comm'r:

DEWILL EVANS, Esq.,
E. C. ALGIRE, Esq.,
HARTFORD ALLEN, Esq.,

Docket No. 67179

WILSHIRE OIL COMPANY, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1932

Jul. 28—Petition received and filed. Taxpayer notified. (Fee paid)

Jul. 29—Copy of petition served on General Counsel.

Aug. 19—Answer filed by General Counsel.

Sep. 13—Copy of answer served on taxpayer. Circuit Calendar.

1934

Mar. 30—Hearing set week of June 4, 1934 at Beverly Hills, California.

1934

Jun. 28—Hearing had before Mr. Adams on petitioner's motion for a continuance. Proceedings restored to Los Angeles Calendar. Appearance of George Bouchard, Esq., filed.

Jun. 28—Order of continuance to Los Angeles, California circuit calendar entered.

1935

Aug. 6—Hearing set week of Sept. 30, 1935 at Los Angeles, California.

Oct. 25—Hearing had before Mr. Turner, Div. 8 on merits. Petitioner moves to continue to the next circuit calendar at Los Angeles, Calif. Showing good cause — granted. Called 9/30/35.

Nov. 4—Order of continuance to the next circuit calendar for hearing at Los Angeles, California entered.

Dec. 21—Transcript of hearing of Oct. 25, 1935 filed.

1936

Mar. 27—Notice of the appearance of Joseph D. Brady as counsel for taxpayer filed.

Apr. 3—Hearing set beginning June 15, 1936 at Los Angeles, California.

Jun. 24—Hearing had before Mr. Sternhagen, Div. 10. Submitted. Motion of counsel to consolidate for hearing granted. Amended answer filed in docket 73955 on June 22, 1936. Copy served. Amendment to petition filed in both dockets. Copy served. Answer to amendment to petition filed. Copy served.

1936

Stipulation of facts and supplemental stipulation of facts filed at hearing. Petitioner's brief due August 8, 1936—respondent's brief due Sept. 8, 1936—reply Oct. 8, 1936. Called June 15, 1936.

July. 11—Transcript of hearing of June 24, 1936 filed.

Jul. 28—Brief filed by taxpayer.

Sep. 8—Reply brief filed by General Counsel.

Nov. 18—Motion for leave to file reply brief (reply brief attached) filed by taxpayer. 11/18/36 granted.

Nov. 18—Reply brief filed by taxpayer.

Nov. 19—Copy of motion and reply brief served on General Counsel. [1*]

1937

Feb. 10—Opinion rendered, J. M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

Mar. 26—Notice of settlement filed by taxpayer.

Mar. 30—Hearing set April 21, 1937 on settlement.

Mar. 30—Copy of notice of settlement and hearing date served on General Counsel.

Apr. 21—Hearing had before Mr. Sternhagen on the petitioner's computation. Case to be simultaneously covered by judgment.

Apr. 30—Decision entered, Mr. Sternhagen, Div. 10.

May 10—Transcript of hearing of April 21, 1937 filed.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1937

Jul. 20—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

Jul. 30—Proof of service filed by General Counsel.

Aug. 24—Praecipe filed with proof of service thereon.

[2]

Docket No. 73955

WILSHIRE OIL COMPANY, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1933

Oct. 6—Petition received and filed. Taxpayer notified. (Fee paid)

Oct. 6—Copy of petition served on General Counsel.

Dec. 4—Answer filed by General Counsel.

Dec. 12—Copy of answer served on taxpayer.

1934

Mar. 30—Hearing set week of June 4, 1934 at Beverly Hills, Calif.

Jun. 28—Hearing had before Mr. Adams on motion of petitioner for a continuance. Proceedings restored to the circuit calendar at Los Angeles, California. Appearance of Geo. Bouchard, Esq., filed.

1934

Jun. 28—Order of continuance to the next circuit calendar at Los Angeles, California, entered.

1935

Aug. 6—Hearing set week of Sept. 30, 1935 at Los Angeles, California.

Oct. 25—Hearing had before Mr. Turner on merits. Petitioner moves to continue on next Los Angeles, California circuit calendar—showing good cause—granted. Called 9/30/35.

Nov. 4—Order of continuance on the next circuit calendar for hearing at Los Angeles, California entered.

Dec. 21—Transcript of hearing of Oct. 25, 1935 filed.

1936

Mar. 27—Notice of the appearance of Joseph D. Brady as counsel for taxpayer filed.

Apr. 3—Hearing set week of June 15, 1936 at Los Angeles, California.

Jun. 24—Hearing had before Mr. Sternhagen on merits. Submitted. Counsel moves to consolidate with docket 67179 for hearing—granted. Amended answer filed 6/22/36—copy served. Amendment to petition filed—copy served. Answer to amendment to petition filed—copy served. Stipulation and supplemental stipulation of facts filed. Petitioner's brief due 8/8/36—respondent's brief due 9/8/36. Reply due 10/8/36. Called 6/15/36.

1936

Jul. 11—Transcript of hearing of June 24, 1936 filed.

Jul. 28—Brief filed by taxpayer. (1) July 29, 1936 21 copies received. 7/29/36 copy served.

Sep. 8—Reply brief filed by General Counsel.

Nov. 18—Motion for leave to file reply brief (reply brief attached) filed by taxpayer. 11/18/36 granted.

Nov. 18—Reply brief filed by taxpayer. 11/9/36 copy served.

1937

Feb. 10—Opinion rendered, John M. Sternhagen, Div. 10. Judgment will be entered under Rule 50. [3]

Mar. 26—Notice of settlement filed by taxpayer.

Mar. 30—Hearing set April 21, 1937 on settlement.

Mar. 30—Copy of notice of settlement and notice of hearing date served on General Counsel.

Apr. 16—Motion for decision under Rule 50 filed by General Counsel. 4/17/37 copy served.

Apr. 21—Hearing had before Mr. Sternhagen on petitioner's computation. Case *to* simultaneously covered by judgment.

Apr. 30—Decision entered, Mr. Sternhagen, Div. 10.

May 10—Transcript of hearing of April 21, 1937 filed.

Jul. 20—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

Jul. 30—Proof of service filed by General Counsel. (2).

Aug. 24—Praecipe filed with proof of service thereon.

United States Board of Tax Appeals
Docket No. 67179

WILSHIRE OIL COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named corporation hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT:AR:E-7:RHO-60D) dated June 1, 1932, and as the basis of its proceeding alleges as follows:

(1) The petitioner is a California corporation, with its principal office located at 2455 East 27th Street, Los Angeles, California. Its completed federal income tax return for the year 1929 was filed on or about June 14, 1930 with the Collector of Internal Revenue for the Sixth Collection District of California at Los Angeles. Said return was made on the accrual basis consistently with petitioner's method of accounting.

(2) The notice of deficiency, a copy of which, with accompanying statements, is attached and made a part hereof as Exhibit A, was mailed to the petitioner under date of June 1, 1932, as the petitioner believes. Said notice was addressed to "Wilshire Oil Company, Incorporated," which is the same corporation

as "Wilshire Oil Company, Inc.," the true name of the petitioner herein.

(3) The taxes in controversy are income taxes for the calendar year 1929. The deficiency asserted is $37,211.88, of which amount $36,507.81 is in controversy. [5]

(4) The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of the petitioner for the year 1929 the respondent erred in failing to allow sufficient depreciation on the cost of additions to the petitioner's casinghead gasoline plant during 1929.

(b) In determining the taxable net income of the petitioner for the year 1929 the respondent erred in failing to allow sufficient depletion, as provided in Section 114 (b) (3) of the Revenue Act of 1928, in the following respects:

(1) In failing to include in gross income from the oil properties the entire value of the natural gasoline extracted from natural gas produced by petitioner's own properties.

(2) In failing to include in gross income from the oil properties the entire value of petitioner's share of the natural gasoline extracted from natural gas produced on properties subleased by petitioner, in which it retains an over-riding royalty interest.

(3) In failing to include in gross income from the property the entire value of that portion of

the natural gasoline extracted from natural gas owned by other oil and gas producers and treated in petitioner's casinghead gasoline plant, which portion is retained by petitioner as its share or royalty for said treatment and extraction. [6]

(4) In failing to include in gross income from the property the entire value of petitioner's share of natural gasoline extracted from natural gas produced from its fee properties; said natural gas being supplied to others for treatment and extraction and a portion of the extracted gasoline being returned to petitioner as royalty upon said gas.

(5) In improperly deducting from the gross income from the properties:

(1) The amount of expenditures incurred and paid during the year 1929 for wages, fuel, repairs, hauling, etc., in connection with the drilling of wells, building of pipe lines and development of the properties.

(2) The amount of general overhead expense incurred during the year 1929 in connection with the drilling of wells, building of pipe lines and development of said properties.

(3) The amount of depreciation sustained on the cost of tangible oil well and drilling equipment used in connection with the drilling of wells, building of pipe lines and development of said properties.

(5) The facts upon which the petitioner relies are as follows:

(a) During the year 1923, the Fellows Gasoline Company constructed a casinghead gasoline absorption plant in the Santa Fe Springs [7] Oil Field, Los Angeles County, California. Subsequently, as at December 1, 1926, petitioner acquired all of the assets —including the casinghead absorption plant—and assumed the liabilities of the said Fellows Gasoline Company.

Immediately prior to 1929, said plant consisted of two separate and complete operating systems or *units* each of which was used to extract gasoline from wet gas supplied from the properties of the petitioner and its associated companies in the Santa Fe Springs Field. The approximate capacity of the plant immediately prior to 1929 was 50,000,000 cu. ft. of wet gas, estimated to yield 50,000 gallons of natural gasoline per day. During 1928, the fifth year of operation, due to rapid decline in natural gas production of the field, the wet gas treated amounted to an average of 1,600,000 cu. ft. per day, a basis that was scarcely profitable.

A new and deeper oil sand was discovered at Santa Fe Springs in the latter half of 1928, which gave promise of an additional supply of oil and gas from the field. The petitioner accordingly constructed three additional units to said casinghead gasoline plant at a cost of $370,246.36, providing an additional capacity of approximately 75,000,000 cu. ft. per day. During 1929, the first year of operation of the enlarged

plant, the wet gas treated by the entire plant amounted to an average of only $52,000,000 cu. ft. per day as compared with a capacity of about 125,000,000 cu. ft. During June, 1932, the [8] amount of gas treated averaged approximately 14,000,000 cu. ft. per day, or not more than 11% of capacity. The useful life of the additions to said plant constructed during 1929 was estimated by petitioner to be five years. The exhaustion, wear and tear sustained at the rate of 20% per annum during the calendar year 1929 with respect to said additional construction costing $370,246.36 was $45,911.00, which amount petitioner deducted in determining taxable net income for said year 1929. Respondent in determining taxable net income for said year has disallowed the sum of $22,955.50, or one-half of the amount of the deduction claimed by petitioner.

(b) (1) During the year 1929 petitioner owned and operated several leasehold interests of oil and gas properties in the Santa Fe Springs Oil Field. All of the natural gas produced upon said properties was run to petitioner's aforementioned casinghead gasoline absorption plant at Santa Fe Springs for treatment and removal of the natural gasoline. Of the value of gasoline thus produced, approximately 1/18 was paid to the lessor as royalty under the terms of the lease, and the balance, or approximately 17/18, retained by petitioner. Petitioner, in determining the depletion allowable in accordance with Section 114 (b) (3) of the Revenue Act of 1928, has included in the gross income from the property

for the year 1929 the entire value of its 17/18 share of [9] natural gasoline as aforesaid, and has included in the deductions from gross income from the property the proportionate cost of extraction of said natural gasoline. The respondent has arbitrarily and erroneously disallowed 60%, more or less, of the value included by petitioner as aforesaid, thereby depriving petitioner of a substantial portion of the depletion deduction authorized by law.

(b) (2) Prior to 1929 petitioner subleased to the Commodore Petroleum Company two certain leasehold interests known as the Babonet and Landl Leases, petitioner retaining as royalty 50% of all oil and gas recovered by said Commodore Petroleum Company, out of which 50% petitioner remained obligated to the original lessor for the 1/6 landowner's royalty. The Commodore Petroleum Company operated the aforesaid leases during 1929. The natural gas produced from said leases was treated by the petitioner in its casinghead gasoline plant at Santa Fe Springs, California, being the same plant referred to in foregoing paragraphs hereof. Of the gasoline recovered from the natural gas thus treated, 1/18 of its value was paid to the landowner and original lessor; 1/6 of its value was paid to the Commodore Petroleum Company, the operator of the properties; and the balance or 7/9 was retained by petitioner. Petitioner, in determining the depletion allowable in accordance

with Section 114 (b) [10] (3) of the Revenue Act of 1928, has included as gross income from the property the entire value of its 7/9 share of the natural gasoline as aforesaid and included in the deduction from gross income from the property, the proportionate cost of extraction of said natural gasoline. The respondent has arbitrarily and erroneously disallowed 50%, more or less, of the value included by petitioner as aforesaid, thereby depriving petitioner of a substantial portion of the depletion deduction authorized by law.

(b) (3) Petitioner during 1929 owned and operated a casinghead gasoline plant at Santa Fe Springs, California, as stated in the foregoing paragraphs.

In addition to treating the wet gas received from the properties mentioned above, petitioner also treated wet gas recovered from the following leaseholds of its associated companies: Off Lease, owned by Bandini Petroleum Company; Baker Lease, owned by Ambassador Petroleum Company; Koontz and Eagle Leases, owned by Wilshire Annex Oil Company. In addition thereto, petitioner treated the gas recovered from properties subleased by certain of said associated companies in which said companies retained royalty interests, to-wit: Santa Fe Dome, sublease of Bandini Petroleum Company; Buckeye Union, sublease of Ambassador Petroleum Company. [11]

The petitioner retained the entire production of the casinghead gasoline extracted from said

wet gas and each month credited each associated company which supplied said wet gas with approximately 1/3 of the value of the casinghead gasoline extracted therefrom. The value of the 2/3 portion retained by the petitioner for the extraction was credited on the petitioner's books each month as operating income for the casinghead gasoline plant.

In computing the amount of statutory depletion allowable as a deduction for the year 1929, pursuant to Section 114 (b) (3) petitioner included in gross income from the property the value of petitioner's said 2/3 share of casinghead gasoline retained, or such share as was retained. In computing net income from the property for the purpose of applying the 50% limitation provided in Section 114 (b) (3) of the Revenue Act of 1928, petitioner deducted from said gross income from the property, a pro rata share of the cost of operating and maintaining said casinghead gasoline plant.

No depletion has been claimed or allowed to any of the aforementioned associated companies in respect of the 2/3 interest in said natural gasoline produced which was retained by petitioner.

Respondent in computing the amount of statutory depletion allowable as a deduction for the year 1929, has erroneously disallowed the entire amount of depletion computed by [12] the petitioner with respect to the income derived by

the petitioner from the treatment of wet gas from the properties of its associated companies.

(b) (4) During the year 1929 petitioner operated several oil and gas properties owned by it in fee in the Huntington Beach Oil Field. Prior to 1929 petitioner contracted to sell the wet gas recovered from said properties at Huntington Beach to the O. C. Fields Corporation, which corporation operated a casinghead gasoline plant in the Huntington Beach Oil Field. This contract was in effect during the year 1929. The Fields Corporation returned to petitioner each month 60% of the casinghead gasoline extracted from the wet gas recovered from petitioner's fee properties.

The value of the casinghead gasoline so returned was credited on petitioner's books each month and was included in petitioner's taxable net income for 1929. In computing the amount of statutory depletion allowable as a deduction for the year 1929, pursuant to Section 114 (b) (3) petitioner included in gross income from the properties operated by petitioner at Huntington Beach, the value of petitioner's entire share of 60% of the casinghead gasoline returned to petitioner by the Fields Corporation. Respondent in computing the amount of statutory depletion for said year, has arbitrarily and erroneously *excluded* from gross income from said [13] properties about 40%, more or less, of the value of petitioner's share of 60% returned to petitioner by the Fields Corporation, thereby depriving pe-

titioner of a substantial portion of the depletion deduction authorized by law.

(b) (5) Petitioner for the year 1929 and years prior thereto has, pursuant to authority contained in respondent's Regulations, consistently deducted from gross income in determining taxable net income all amounts incurred and expended during said years for wages, fuel, repairs, hauling, etc. However, in computing the net income from oil properties operated by the petitioner for the purpose of determining the allowable statutory depletion for the year 1929, pursuant to Section 114 (b) (3) of the Revenue Act of 1928 petitioner has excluded from the deduction from gross income from the property the following items:

(1) Expenditures of the petitioner during the year 1929 for wages, fuel, repairs, hauling, etc., in connection with the drilling of wells, building of pipe lines and development of the properties.

(2) The amount of general overhead expense incurred during the year 1929 in connection with the drilling of wells, building of pipe lines and development of the properties. [14]

(3) Depreciation sustained by petitioner upon the cost of tangible oil well equipment and drilling equipment used during and for the purpose of developing the oil properties, all of which depreciation was sustained prior to production from the properties.

The respondent in recomputing the net income from petitioner's oil properties for the said purpose of determining the amount of allowable depletion for the year 1929, has erroneously *deducted* from gross income from the properties the aforesaid sums, thereby unlawfully depriving petitioner of a substantial deduction authorized by the aforesaid Section 114 (b) (3) of the Revenue Act of 1928.

(6) Wherefore, petitioner prays that the Board may hear this proceeding, determine that the deficiency due from the petitioner for the year 1929 should not be in excess of $704.07, and grant to the petitioner such other and further relief as to the Board seems just and equitable.

WILSHIRE OIL COMPANY, INC.
By GEORGE L. MACHRIS,
President.
245 East 27th Street
Los Angeles, California [15]

State of California
County of Los Angeles—ss.

George L. Machris, being duly sworn, says he is President of Wilshire Oil Company, Inc., the petitioner named herein; that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein; and that the facts stated are true, except as to those facts stated to be on information and belief, and those facts he believes to be true.

GEORGE L. MACHRIS

Subscribed and sworn to before me this 26th day of July, 1932.

[Seal] PAUL A. LOWER

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 22, 1933. [16]

EXHIBIT A

Treasury Department
Washington

June 1, 1932

Wilshire Oil Company, Incorporated.
2455 East 27th Street,
Los Angeles, California.

Sirs:

You are advised that the determination of your tax liability for the year (x) 1929 discloses a deficiency of $37,211.88, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the clos-

ing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870
Schedules 1 and 2 [17]

STATEMENT

IT:AR:E-7
RHO-60D

In re: Wilshire Oil Company, Incorporated,
2455 East 27th Street
Los Angeles, California

Tax Liability

Year—1929.
Tax Liability—$200,489.89.
Tax Assessed—$163,278.01.
Deficiency—$37,211.88.

The deficiency shown herein is based upon the report dated October 10, 1931, prepared by Revenue

Agent, P. F. Berger, and transmitted to you under date of November 24, 1931 which report is made a part hereof, and upon such adjustments as are shown in the attached schedules numbered 1 and 2.

Careful consideration has been accorded your protest dated March 16, 1932 in connection with the findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge, on April 4, 1932. The action taken by this office is fully explained in the attached schedules. [18]

Wilshire Oil Company, Incorporated.
Year ended December 31, 1929.

Schedule 1
Adjustments to Net Income

Net income as disclosed by revenue agent's report dated October 10, 1931		$1,833,309.94
As corrected		1,822,635.39
Net adjustment as computed below		$ 10,674.55
Additional income:		
(a) Surbeck sump rental	$ 857.75	
(b) Reduction of gas suit costs	500.65	
Total		$ 1,358.40
Additional deductions:		
(c) Refund 1928 compensation insurance	$3,864.43	
(d) Additional depletion	8,168.52	
Total		12,032.95
Net adjustment as above		$ 10,674.55

Schedule 1-A

Explanation of Items

(a) Surbeck sump rental $857.75, represents the accrual of amounts as rental on the Wilshire Surbeck sump determined as follows:

Wilshire Annex Oil Company	$367.61
Bandini Petroleum Company	490.14
Total added to income	$857.75

(b) Reduction of gas conservation suit costs $500.65, in connection with litigation incurred in 1929, 1930 and 1931, adjusted in accordance with final re-allocation of expenses assumed, and agreed to in conference held in office of internal revenue agent in charge, at Los Angeles, April 4, 1932. [19]

(c) Refund of compensation insurance $3,864.43, representing a proper accrual at December 31, 1928, and eliminated in computing 1929 income, allowed.

(d) Additional depletion $8,168.52, is determined as follows:

Depletion allowed	$377,785.08
Depletion deducted Exhibit "F", revenue agent's report	369,616.56
Additional depletion, allowed	$ 8,168.52

Depletion allowed is in accordance with the decision reached in conference held in the office of the internal revenue agent in charge at Los Angeles on April 4, 1932, the details of which are set forth in letter to you from internal revenue agent in charge, dated May 13, 1932, items A to E, inclusive.

Schedule 2

Computation of Tax

Income Tax

Net income for taxable year, schedule 1	$1,822,635.39
Income tax 11%	200,489.89
Total previously assessed, Account #402,905	163,278.01
Deficiency	$ 37,211.88

[Endorsed]: U.S.B.T.A. Filed July 28, 1932.

[20]

[Title of Court and Cause—Docket No. 67179.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations of paragraph (1) of the petition.

(2) Admits the allegations of paragraph (2) of the petition.

(3) Admits the taxes in controversy are income taxes for the calendar year 1929.

(4) Denies the respondent erred in the determination of the deficiency as alleged in subparagraphs (a) and (b) of paragraph (4) of the petition, and subdivisions thereunder.

(5) For lack of information upon which to form a belief as to the truth or falsity of said allegations, denies the material allegations of fact contained in subparagraphs (a) and (b) of paragraph (5) of the petition, and subdivisions thereunder.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
HENRY A. COX,
T. A. DILS,
Special Attorneys,
Bureau of Internal Revenue

[Endorsed]: U.S.B.T.A. Filed August 19, 1932.

[21]

[Title of Court and Cause—Docket No. 67179.]

AMENDMENT TO PETITION

Paragraph (4) of the petition is amended to read as follows:

(4) The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in computing the amount of percentage depletion to which petitioner was entitled with respect to the oil and gas wells on its Peterson, Baker and Crawford properties in that in determining the net income from each of said properties respondent erroneously deducted from gross income from the property the following items, among others: (1) amounts expended for wages, fuel, repairs, hauling, etc.,

in connection with the exploration of the property, drilling of oil and gas wells thereon, and development thereof; (2) depreciation during the drilling period on equipment used in drilling the wells referred to in item 1; (3) depreciation of equipment used for the production of oil. [22]

(b) Respondent erred in failing to allow a depreciation deduction in the amount of $44,065.56 for depreciation sustained on petitioner's natural gas plant used in petitioner's business during the taxable year 1929.

JOSEPH D. BRADY,
Counsel for Petitioner
458 South Spring Street,
Los Angeles, California.

[Endorsed]: U.S.B.T.A. Filed at hearing June 24, 1936.

[23]

[Title of Court and Cause—Docket No. 67179.]

ANSWER TO AMENDMENT TO PETITION

NOW comes the respondent, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the amendment to the petition in the above-entitled proceeding denies as follows:

4(a) and (b). Denies the allegations of paragraphs 4(a) and (b) of the Amendment to the Petition.

Wherefore it is prayed that the petition as amended be denied.

(Signed) HERMAN OLIPHANT
General Counsel for the
Department of the Treasury.

Of Counsel:
HARTFORD ALLEN,
Special Attorney,
Bureau of Internal Revenue.
A/nw

[Endorsed]: U.S.B.T.A. Filed at hearing June 24, 1936.

[24]

[Title of Court and Cause—Docket No. 73955.]

PETITION

The above named corporation hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT:AR:E-7:RHO-60D) dated August 10, 1933, and as a basis of its proceedings alleges as follows:

(1) The petitioner is a California corporation with its principal office at 2455 East 27th Street, Los Angeles, California. Its completed federal income tax return for the year 1930 was filed on or about June 12, 1931 with the Collector of Internal Revenue for the Sixth Collection District of California at Los

Angeles. Said return was made on the accrual basis consistent with petitioner's method of accounting.

(2) The notice of deficiency, a copy of which, with accompanying statements, is attached and made a part hereof as Exhibit A, was mailed to the petitioner on August 10, 1933. Said notice was addressed to "Wilshire Oil Company, Incorporated," which is the same corporation as "Wilshire Oil Company, Inc.," the true name of the petitioner herein.

(3) The taxes in controversy are income taxes for the calendar year 1930. The deficiency asserted is $51,144.64, of which the sum of $50,145.22 is in controversy.

(4) The determination of tax set forth in said notice of deficiency [25] is based upon the following errors:

(a) The failure of the Commissioner to allow as a deduction from gross income in the year 1930, depreciation at the rate of twenty (20) per cent per annum upon the cost of petitioner's casinghead gas plants constructed during the year 1929.

(b) The failure of the Commissioner to allow as a deduction from gross income in the year 1930, depreciation at the rate of ten (10) per cent per annum upon the cost of petitioner's oil storage tanks.

(c) The failure of the Commissioner to allow as a deduction from gross income in the year 1930, sufficient percentage depletion as provided by statute on proceeds of production of oil and

gas wells in which petitioner had a depletable interest.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner and/or its affiliated subsidiary constructed during the years 1923 to 1929, inclusive, five casinghead gas plants on the Surbeck lease in the Santa Fe Springs Oil Field, Los Angeles County, California. Three of said five casinghead gas plants were constructed in 1923 at a cost including gathering pipe lines, etc., of approximately $757,937.84. Petitioner during 1929 constructed two new casinghead gas plants alongside the old plants on the Surbeck property at a cost of $428,553.20. [26]

Petitioner and its subsidiary companies acquired prior to 1923 a number of prospective oil properties through leases in the Santa Fe Springs Oil Field. Said properties were potentially productive of oil and gas in large quantities from the upper oil sands then known. In the latter half of 1928 petitioner discovered a new and deeper oil sand at the Santa Fe Springs Oil Field which gave promise of an additional prolific supply of oil and gas. The casinghead gas plants constructed in 1923 and those constructed in 1929 were planned with a view to having sufficient capacity to handle and treat the anticipated volume of wet gas produced during the flush period of production from the oil and

gas wells of the petitioner and its subsidiary companies. Due to an insufficient supply of casinghead gas only one of the three plants constructed in 1923 was operated continuously from 1923 to 1929. During the first half of 1928, the fifth year of operation, the casinghead gas treated by petitioner's plants amounted to an average of 1,600,000 cu. ft. per day, or about 1.7 per cent of the guaranteed capacity of the original three plants and far less than the capacity of the one plant operated.

The maximum capacity of petitioner's plants constructed in 1929 was approximately 75,000,000 cu. ft. of wet gas per day. The casinghead gas treated during 1929 by both old and new plants amounted to an average of approximately 52,000,000 cu. ft. per day. At the present time (September, 1933) the amount of gas treated daily averages about [27] 8,000,000 cu. ft. or about one-third of the nominal capacity of one of the new plants. The old plants have not been operated since 1930.

At the close of 1929, petitioner, basing its judgment on its familiarity and experience with the useful life of this class of equipment estimated that the normal useful life and the economic term of usefulness of said new plants would practically terminate within a period of five years. The reasonable depreciation in value of the casinghead gas plants constructed by the petitioner in 1929 was at the rate of 20 per cent of its cost

of $428,553.20. In computing taxable net income for the year 1930, petitioner deducted from income the sum of $84,421.00, representing depreciation at the rate of 20 per cent per annum upon the cost of petitioner's casinghead gas plants constructed during the year 1929.

Respondent allowed as a deduction from income for the year 1930, the sum of $42,210.50 for the depreciation upon the cost of petitioner's casinghead gas plants constructed during 1929. This allowance was at the rate of 10 per cent per year on cost.

(b) Petitioner during the years 1922 to 1930, inclusive, constructed large steel tanks for the purpose of storing its surplus crude oil and the refined and by-products obtained therefrom. The storage tanks first constructed were located at or near petitioner's refinery at Vernon, California. [28]

A description of the Vernon storage tanks follows:

Tank No.	Acquired	Construction	Capacity Bbls	Cost
1-7 (Run Down)	1922	Steel	3,000 each	$ 18,867.37
41 " "	1923	"	80,000	30,613.76
42 " "	1923	"	80,000	29,941.53
33	1922	"	6,000	6,126.04
34	1922	"	10,000	7,361.59
35	1922	"	10,000	7,243.67
36	1923	"	10,000	7,271.77
37	1923	"	10,000	7,712.63
38	1923	"	10,000	7,407.01
39	1923	"	10,000	7,363.48
40	1922	"	80,000	35,329.41
43	1923	"	80,000	35,456.13
44	1923	"	80,000	35,550.44
45	1923	"	80,000	35,405.22
46	1926	"	80,000	26,223.49
47	1926	"	80,000	26,163.99
48	1926	"	10,000	5,554.96
49	1926	"	10,000	5,608.43
50	1926	"	10,000	5,586.95
51	1928	"	80,000	28,120.08
52	1928	"	80,000	28,120.09
Miscellaneous	1923	"	0	2,471.19
TOTAL VALUE OF VERNON TANKS				$399,499.23

The first nine tanks above listed are used as "run down tanks." They are continuously used as such due to the injurious chemical contents of the untreated product. The remainder of the tanks are used to store crude oil, finished gasoline, and the by-products of kerosene distillate and fuel oil.

Petitioner discovered a new and deeper oil sand at the Santa Fe Springs Oil Field in the latter half of 1928. Additional storage tanks were immediately contracted for, and were constructed during 1929 and 1930 on petitioner's fee property at Norwalk, California. The capacity of the Norwalk storage [29] tanks amounted to ap-

proximately 6,400,000 barrels, comprising 32 tanks of a capacity of 130,000 barrels each and 14 tanks of a capacity of 164,000 barrels each. The cost of said Norwalk tanks aggregated $2,470,005.43, of which $1,542,106.45 was expended during 1929 and $927,898.98 was expended during 1930.

Steel tanks in finished gasoline service require no attention from the corrosion point of view. In the case of crude, rundown and other services the roof suffers most severely; the bottom next, and the sides least. The tank bottoms suffer from the water (and the impurities it contains) that usually accompanies the oil; in the case of crude oil, salt water containing hydrogen sulfide; in distillates, hydrochlorine acid as well as hydrogen sulfide; and in re-run distillates from acid-treated stocks, sulphur dioxide.

Subsequent to the time petitioner contracted for the Norwalk tankage and prior to the close of the taxable year 1930 State laws having the effect of curtailing the production of crude oil became effective. The volume of crude oil for which petitioner primarily constructed its Norwalk tanks declined at an abnormally high rate during the taxable year 1930. The useful life of petitioner's storage tanks under such conditions did not exceed ten years. The reasonable depreciation in value of the petitioner's Vernon and Norwalk storage tanks was at the rate of 10 per cent of their cost. [30] In computing taxable

net income for the year 1930, petitioner deducted from the income the sums of $39,705.64 and $220,956.53, representing depreciation during the year 1930 at the rate of 10 per cent per annum upon the cost of petitioner's oil storage tanks at Vernon and Norwalk, California, respectively. Respondent allowed as a deduction from income for the year 1930, the sums of $19,974.96 and $110,478.27, for the depreciation upon the cost of petitioner's oil storage tanks at Vernon and Norwalk, California. This allowance was at the rate of 5 per cent per year on cost.

(c) (1) Respondent in determining the "net income of the taxpayer (computed without allowance for depletion) from the property" for the purpose of determining the percentage depletion deduction, erroneously included the following items as deductions:

(a) The state corporation franchise tax in the amount of $6,151.11.

(b) Development expenses in the amount of $351,027.87.

(c) Depreciation on development equipment in the amount of $124,341.98.

(2) Respondent, in computing the gross income from oil and gas wells operated by petitioner during 1930 in the Santa Fe Springs Oil Field for the purpose of determining the percentage depletion deduction, erroneously failed to include in said gross income 60% of the value

of casinghead gasoline recovered from casinghead gas taken from said oil and gas wells. [31]

(3) Respondent in determining the percentage depletion deduction in respect of gross income derived by petitioner in connection with casinghead gas taken from oil and gas wells under contracts commonly called casinghead gas contracts, erroneously failed to include as gross income the value of petitioner's share of casinghead gasoline derived from casinghead gas taken from said oil and gas wells under contract.

With respect to the deduction of state franchise tax in determining petitioner's net income from the property the facts are as follows:

During the year 1930, petitioner paid to the State of California a corporation franchise tax computed upon the basis of petitioner's net income for the preceding calendar year. The amount of tax so paid was $20,503.70, of which the sum of $6,151.11 was apportioned by respondent to the production of oil. Respondent included said amount of $6,151.11 in his deductions from gross income from petitioner's properties, thereby decreasing net income from the properties and the percentage depletion allowable.

The state franchise tax was paid by petitioner for the privilege of exercising its corporate franchise during the year 1930. The expenditure had no relation to the kind of business conducted and was not an expenditure "in respect to the property upon which depletion was claimed." [32]

With respect to the deduction of development expenses in the amount of $351,027.87 hereinbefore stated, petitioner pursuant to respondent's Regulations in force for the taxable year 1930, elected to treat development expenditures as ordinary and necessary business expenses deductible under section 23 (a), Revenue Act of 1928, in computing taxable net income. Said development expenses were incurred in connection with the drilling of petitioner's oil and gas wells in the Santa Fe Springs Oil Field and for repairs to drilling outfits, derricks, well machinery and tools, boilers, pipelines etc., used in the development of said oil and gas wells. All of said development expenses were incurred by petitioner prior to any production of oil or gas from said wells.

With respect to the depreciation deduction hereinbefore stated, petitioner sustained depreciation in the amount of $124,341.98 upon the cost of tangible oil well equipment and drilling equipment used during and for the purpose of developing the oil and gas wells in the Santa Fe Springs Oil Field. All of said depreciation was sustained prior to any production of oil or gas from said oil and gas wells. In computing the net income from petitioner's oil and gas properties for the purpose of determining the percentage depletion deduction for the year 1930, pursuant to section 114 (b) (3), Revenue Act of 1928, petitioner has excluded as a deduction

from gross income from the [33] property the aforesaid sums of $6,151.11, $351,027.87 and $124,341.98. Respondent in computing the net income from petitioner's oil and gas wells for the said purpose of determining the amount of the percentage depletion deduction for the year 1930, erroneously deducted from gross income from the property the aforesaid sums of $6,151.11, $351,027.87 and $124,341.98.

With respect to respondent's failure to include as gross income from the oil and gas wells operated by petitioner in the Santa Fe Springs Oil Field sixty (60) per cent of the value of casinghead gasoline recovered from casinghead gas taken from said oil and gas wells, the facts are as follows:

Petitioner owns and operates casinghead gasoline plants adjacent to the Santa Fe Springs Oil Field. Petitioner acquired prior to the year in question certain oil and gas properties through leases in said oil field. The properties were developed by petitioner and the oil and gas wells drilled thereon supplied petitioner's casinghead gas plants with casinghead gas.

The casinghead gas plants separated and liquefied the natural gasoline contained in the casinghead gas. The remaining or dry gas was sold, used for fuel, or returned to the wells. Petitioner credited to its Santa Fe Springs producing properties for depletion purposes the value of the natural or casinghead gasoline recovered during

1930 from the casinghead gas taken from [34] petitioner's oil and gas wells in the Santa Fe Springs Field. In determining the gross income from said properties for depletion purposes petitioner deducted from the sum so credited to the property, the value of the lessor's share of casinghead gasoline.

Respondent in respect of gross income derived by petitioner from said casinghead gas allowed as gross income for depletion purposes from petitioner's said properties, 40 per cent of the value of petitioner's share of casinghead gasoline recovered.

With respect to respondent's failure to include as gross income for depletion purposes the value of petitioner's share of casinghead gasoline derived from casinghead gas taken from oil and gas wells under contract, the facts are as follows:

Petitioner acquired several prospective oil properties in the Santa Fe Springs Oil Field during the period 1920 to 1923. Petitioner organized several producing companies and exchanged certain of its oil properties for stock and controlling interest of said companies, herein referred to for convenience as "subsidiary companies".

Petitioner constructed casinghead gas plants adjacent to said oil field and contracted with each of its subsidiary companies for the taking and separating of the natural or casinghead gas-

oline from the casinghead gas [35] produced from oil and gas wells of the subsidiary companies. During 1923 to 1930, inclusive, petitioner was taking casinghead gas, under said contracts, from certain oil and gas wells of its subsidiary companies and treating the gas in its conversion plants to separate the gasoline from it.

After said wells had ceased flowing in commercial quantities from the natural pressure, it was necessary for petitioner to take direct means by the introduction of high pressure dry gas into said wells to induce a larger flow of oil and gas. Petitioner, by its compressors, also created a vacuum within its wet gas lines attached to the wells and thereby produced in cooperation with the operator of the well oil and gas in larger quantities. Petitioner, by virtue of said contracts, obtained the right to enter upon the property of its subsidiary companies, erect and maintain equipment thereon, attach its equipment to the casinghead of the well, and exert forces which would bring the oil and gas up out of the ground. Petitioner shared in the casinghead gas produced from said properties to the extent of 66-2/3 per cent, more or less, of the casinghead gasoline separated and recovered by petitioner's plant. In determining the petitioner's gross income for depletion purposes from properties of its subsidiary companies petitioner treated as gross income 66-2/3%, more or [36] less, of the value of the casinghead gasoline

separated and recovered by petitioner from the casinghead gas taken from said oil and gas wells.

Respondent in respect of income derived by petitioner in connection with casinghead gas taken from oil and gas wells under contract allowed to the petitioner for the year 1930 no depletion.

Respondent has unlawfully deprived petitioner of a substantial deduction authorized by section 114(b) (3), Revenue Act of 1928.

(6) Wherefore, petitioner prays that the Board may hear this proceeding, determine that the deficiency due from the petitioner for the year 1930 should not be in excess of $999.42 and grant to the petitioner such other and further relief as to the Board seems just and equitable.

WILSHIRE OIL COMPANY, INC.
By George L. Machris, President.
2455 East 27th Street
Los Angeles, California

[37]

State of California
County of Los Angeles—ss.

George L. Machris, being duly sworn, says he is President of Wilshire Oil Company, Inc., the petitioner named herein; that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein; and that the facts stated are true,

except as to those facts stated to be on information and belief, and those facts he believes to be true.

GEORGE L. MACHRIS.

Subscribed and sworn to before me this 4th day of October, 1933.

[Seal] PAUL A. LOWER

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires May 22, 1937 [38]

Treasury Department
Washington

August 10, 1933

Wilshire Oil Company, Incorporated,
2455 East 27th Street,
Los Angeles, California

Sirs:

You are advised that the determination of your income tax liability for the year 1930, discloses a deficiency of $51,144.64 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

However, if you do not desire to petition, you are requested to execute the enclosed form and forward

it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier; whereas if this form is not filed, interest at the rate of 6% per annum will accumulate.

Respectfully,
GUY T. HELVERING,
Commissioner.
By (Signed) CHAS. T. RUSSELL
Deputy Commissioner.

Enclosures:
Statement
Form 870
Schedules 1 and 2

[39]

STATEMENT

1T:AR:E-7
RHO-60D

In re: Wilshire Oil Company, Incorporated,
2455 East 27th Street,
Los Angeles, California.

Income Tax Liability

Year—1930
Income Tax Liability—$134,651.45
Income Tax Assessed—$83,506.81
Deficiency—$51,144.64

The deficiency shown herein is based upon the report dated September 13, 1932, prepared by Revenue Agent W. F. Upson and transmitted to you under date of October 6, 1932, which report is made a part hereof, and upon such adjustments as are shown in the attached schedules numbered 1 and 2.

Careful consideration has been accorded your protest dated February 28, 1933, filed with the internal revenue agent in charge, Los Angeles, against office letter of January 30, 1933, approving revenue agent's report dated September 13, 1932, in connection with the findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge, on March 17, 1933.

A consent which will expire June 30, 1934, except as extended by the provisions of section 277 of the Revenue Act of 1928, is on file for the year 1930.

A preliminary notice of this determination was mailed you June 17, 1933, against which you have not filed a protest. [40]

Wilshire Oil Company, Incorporated. Year ended December 31, 1930.

SCHEDULE 1

Adjustments to Net Income

Net income as disclosed by revenue agent's report dated September 13, 1932		$1,103,645.71
As corrected		1,122,095.44
Adjustment excessive depreciation		$ 18,449.73

Explanation of Items

Excessive depreciation $18,449.73, is determined as follows:

Depreciation deducted, refinery (various assets)	$91,715.87	
Depreciation deducted, export (building and fixtures)	764.04	
Depreciation deducted, distributing plant	406.56	$92,886.47
Depreciation allowed, refinery (various assets)	$71,985.19	
Depreciation allowed, export (building and fixtures)	382.01	
Depreciation allowed, distributing plant (building and fixtures)	2,069.54	74,436.74
Total disallowed		$18,449.73

Depreciation allowed on Refinery—Assets, is computed as follows:

Asset	Cost	Additions & Deductions	Total Cost	Rate Allowed	Depreciation Allowable
Office Building & Fixtures	$ 4,213.82	$	$ 4,213.82	10	$ 421.32
Pump House	674.78	1,390.00	2,064.78	10	79.02
Foamite Building	3,374.19		3,374.19	10	337.44
Condensing Apparatus	223,732.03		223,73[illegible]3	10	21,661.44
Steam System	40,863.43	19,425.69	60,289.12	10	4,746.80
Treating Apparatus	29,428.46	(982.42)	28,446.04	10	2,760.21
Cooling Towers	15,897.95		15,897.95	10	1,589.76
Loading Racks	5,162.81	162.96	5,325.77	10	521.68
Dykes	14,810.47		14,810.47	10	1,481.04
Oil Pipe Line	72,468.79	4,290.33	76,759.12	10	7,413.44
Pumps	36,440.36	9,878.51	46,318.87	10	4,014.56
Foamite Machinery	6,507.58		6,507.58	10	650.76
Foamite Tanks	11,030.03		11,030.03	10	1,103.04
Foamite Pipe Lines	39,288.38		39,288.38	10	3,928.68
Foamite Extinguishers	7,162.69		7,162.69	10	716.28
Water Wells	5,847.22		5,847.22	10	584.76
Tanks	399,499.23		399,499.23	5	19,974.96
					[41]
Export: Building and Fixtures	7,640.27		7,640.27	5	382.01
Distributing Plant Fixtures	41,390.69		41,390.69	5	2,069.54
Total allowed					$74,436.74

*Refinery assets: In cases above where the depreciation is not full 10% of the asset cost, provision has been made for a remaining salvage value or the balance in the account ten years prior has been dropped.

SCHEDULE 2

Computation of Tax

Income Tax

Net income for taxable year, schedule 1	$1,122,095.44
Income 12%	$ 134,651.45
Total previously assessed, account #402212	83,506.81
Deficiency	$ 51,144.64

[Endorsed]: U.S.B.T.A. Filed Oct. 6, 1933. [42]

[Title of Court and Cause.—Docket No. 73955.]

ANSWER

The Commissioner of Internal Revenue by his Attorney E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, for answer to the Petition filed by the above-named petitioner, admits and denies as follows:

(1), (2), and (3). Admits the allegations contained in paragraphs (1), (2) and (3) of the Petition.

(4). Denies the errors alleged in paragraph (4) of the Petition.

(5). Denies the averments contained in sub-paragraph (a) except the last sub-paragraph thereof; for lack of information upon which to form a belief, denies the averments contained in sub-paragraph (b) except the statement as to the total value of Vernon tanks on page 5 and the averments contained in the first full paragraph on page 6, and the last paragraph at the top of page 7, which averments are admitted; denies the errors alleged in paragraphs (1), (2), and (3) of sub-paragraph (c); admits the averments con-

tained in said sub-paragraph with respect to the amount of corporation franchise tax paid to the State of California in the last paragraphs on page 8, which averments are admitted where not inconsistent with the respondent's determination; for lack of information upon which to form a belief, denies the averments contained on pages 9, 10, 11, and 12, where inconsistent with the determination of the respondent.

[43]

Denies generally and specifically each and every allegation of fact not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) E. BARRETT PRETTYMAN
General Counsel;
Bureau of Internal Revenue.

Of Counsel:
WILLIS R. LANSFORD,
Special Attorney,
Bureau of Internal Revenue.
:wrl/tls 11-29-33.

[Endorsed]: U.S.B.T.A. Filed Dec. 4, 1933. [44]

[Title of Court and Cause—Docket No. 73955]

AMENDED ANSWER

Now comes the Commissioner of Internal Revenue, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for amended answer to the petition filed by the above-named taxpayer, admits and denies as follows:

1. Admits that the petitioner is a California Corporation having its principal office at Los Angeles, California; denies the remaining allegations of Paragraph 1 of the petition.

2. Admits the allegations of Paragraph 2 of the petition.

3. Alleges that the notice of deficiency dated August 10, 1933, sets forth a deficiency in income taxes for the calendar year 1930 in the amount of $51,144.64.

4(a),(b),(c). Denies the allegations of Paragraph 4(a),(b),(c) of the petition.

5. Denies the allegations of Paragraph 5(a),(b),(c) of the petition. [45]

6. Denies generally and specifically each and every allegation not hereinbefore admitted or denied.

Wherefore it is prayed that the appeal be denied.

(Signed) HERMAN OLIPHANT
General Counsel for the
Department of the Treasury.

Of Counsel:
HARTFORD ALLEN,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed at hearing June 22, 1936. [46]

[Title of Court and Cause—Docket No. 73955.]

AMENDMENT TO PETITION

Paragraph (4) of the petition is amended to read as follows:

(4) The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in computing the amount of percentage depletion to which petitioner was entitled with respect to the oil and gas wells on its Peterson, Baker, Crawford and Buckbee properties in that in determining the net income from each of said properties respondent erroneously deducted from gross income from the property the following items, among others: (1) amounts expended for wages, fuel, repairs, hauling, etc., in connection with the exploration of the property, drilling of oil and gas wells thereon, and development thereof; (2) depreciation during the drilling period on equipment used in drilling the wells referred to in item 1; (3) depreciation of equipment used for the production of oil. [47]

(b) Respondent erred in failing to allow a depreciation deduction in the amount of $16,386.71 for depreciation sustained on petitioner's natural gas plant used in petitioner's business during the taxable year 1930.

(c) Respondent erred in failing to allow a depreciation deduction in the amount of $110,478.27 for depreciation sustained on peti-

tioner's storage tanks used in its business during the taxable year 1930.

JOSEPH D. BRADY
Counsel for Petitioner
458 South Spring Street
Los Angeles, California

[Endorsed]: U.S.B.T.A. Filed at hearing June 24, 1936. [48]

[Title of Court and Cause—Docket No. 73955.]

ANSWER TO AMENDMENT TO PETITION

Now comes the respondent, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the amendment to the petition in the above entitled proceeding denies as follows:

4(a), (b), and (c). Denies the allegations of paragraphs 4(a), (b), and (c) of the Amendment to the Petition.

Wherefore it is prayed that the petition as amended be denied.

(Signed) HERMAN OLIPHANT
General Counsel for the
Department of the Treasury.

Of Counsel:
HARTFORD ALLEN,
Special Attorney,
Bureau of Internal Revenue.
HA/nw

[Endorsed]: U.S.B.T.A. Filed at hearing June 24, 1936. [49]

[Title of Court and Cause—Docket Nos. 67179 and 73955]

STIPULATION OF AGREED FACTS

It is hereby stipulated and agreed, by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true.

I.

The petitioner is, and at all times material to this proceeding was, a California corporation, with principal office and place of business at Los Angeles, California, engaged in the business of producing oil and gas from various properties located in Southern California.

II.

During the taxable years 1929 and 1930, petitioner was not affiliated with any other corporation and the returns which it filed with the Collector of Internal Revenue at Los Angeles for said years were returns of its own income and were not consolidated returns.

III.

The controversy between the parties hereto concerns the [50] amount of the deductions for depletion of oil and gas wells for the taxable years 1929 and 1930 allowable under Section 114(b)(3) of the Revenue Act of 1928.

During the taxable years petitioner operated six oil and gas properties at Huntington Beach, California, which it owned in fee; it also operated, as

lessee, five properties located in the Santa Fe Springs Oil Field.

In addition to these eleven properties, which it operated, petitioner also derived royalty income during the taxable years from four oil and gas properties which it had subleased to others prior to the taxable years.

In determining the deficiency for 1929, respondent allowed petitioner a depletion deduction for all fifteen of its oil and gas properties in the amount of $377,785.08. $71,535.08 of said amount relates to the four properties which were under sub-leases, and there is no controversy with respect thereto.

Respondent determined that petitioner sustained losses during the taxable year 1929 from the operation of four of its properties, as follows:

Property	Loss
Buckbee Lease	$111,299.00
Huntington Beach No. 5	14,629.63
Huntington Beach No. 7	13,779.16
Huntington Beach No. 12	14,090.56
Total	$153,798.35

The gross income from the Buckbee lease was $4,600.11, but respondent allowed no depletion deduction with respect thereto. Petitioner takes no exception to respondent's determination [51] in this respect, inasmuch as petitioner concedes that it sustained a loss from the operation of the Buckbee lease in the taxable year.

As to the Huntington Beach properties Nos. 5, 7, and 12, respondent allowed depletion deductions, on the cost basis, aggregating $50.60; and petitioner raises no issue with respect to these properties, or as to its other three Huntington Beach properties or as to its Cecelia lease at Santa Fe Springs.

The controversy as to the year 1929, therefore, is narrowed to the following three properties, to-wit, the Peterson, Baker and Crawford Leases in Santa Fe Springs; for 1930, the controversy concerns these three properties and petitioner's Buckbee lease.

The attached schedule, marked Schedule "A" and made a part hereof by reference, shows, for both taxable years, the undisputed gross income from each property; the net income from each property (computed without allowance for depletion) as determined by respondent; the depletion deduction as determined by respondent for each property in computing the deficiencies; and three items of deductions from gross income from the property—the deductibility of which petitioner puts in questions—marked Items numbered 1, 2 and 3. [52]

IV.

Petitioner concedes that in determining the deficiency for 1930 respondent erroneously failed to disallow a deduction of $43,733.44 erroneously taken by petitioner in its return for said year as officers' salaries, and that the statutory net income, as redetermined by the Board may reflect an adjustment with respect thereto.

Respondent concedes that petitioner is entitled to additional depreciation deductions, not allowed in determining the deficiencies, as follows:

1929	
On Natural Gas Plant	$ 44,065.56
1930	
On Natural Gas Plant	$ 16,386.71
On Storage Tanks	110,478.27

It is agreed that the pleadings of the parties hereto shall be deemed to have been amended so as adequately to raise the adjustments referred to in this paragraph IV.

JOSEPH D. BRADY
Counsel for Respondent
(S) HERMAN OLIPHANT
Counsel for Petitioner

[53]

	1929			1930			
	Peterson Property	Baker Property	Crawford Property	Peterson Property	Baker Property	Buckbee Property	Crawford Property
Gross Income from Property	$371,561.88	$406,935.24	$222,878.05	$193,547.12	$ 87,647.52	$ 35,423.94	$ 53,830.14
Less:							
Item 1. All Expenditures made during the taxable year in connection with exploration or drilling of wells on properties that produced oil, itemized as follows:							
Labor	69,825.59	102,395.65	36,432.04	12,921.25	19,750.57	15,709.48	26,862.94
Outside Professional Services	30.00	1,265.20	616.10	2,269.00	250.00	799.80	280.00
Fuel, Power, Etc.	1,764.44	3,714.40	1,914.81	490.10	478.43	406.51	2,759.21
Material and Supplies	115.00	200.00	1,242.78	257.13	1,390.45	1,496.23	2,311.38
Tool Rental	62,606.76	95,572.60	33,787.40	26,900.97	20,925.35	18,816.98	30,743.60
Truck and Auto Hire	—.—	91.00	—.—	8.50	638.25	282.25	863.75
Repairs to Equipment used in drilling during the drilling period	51,654.46	79,587.69	34,431.36	10,575.51	8,826.23	8,002.99	8,666.46
Small Tools	2.99	46.26	1.02	—.—	—.—	—.—	—.—
Foamite Materials	1,679.60	101.01•	50.60•	—.—	—.—	—.—	—.—
Drilling Tool Expense Adjustment (Sub rentals received)	17,482.68•	27,383.30•	8,164.68•	12,944.48•	12,661.62•	11,024.02•	17,359.65•
General Development Expense	—.—	—.—	—.—	5,870.96	5,742.6,	4,999.95	7,964.13
Totals	$170,196.16	$255,418.49	$100,190.03	$ 46,348.94	$ 45,340.33	$ 39,490.17	$ 62,892.92
Item 2. Depreciation During the Drilling Period on Equipment used in drilling the Wells referred to in Item No. 1, itemized as follows:							
Derricks—Wood	$ 1,094.63	$ 1,094.63	$ 547.32	$ 1,265.97	$ 1,265.97	$ 632.98	$ 1,265.97
" —Steel	736.52	736.52	368.26	400.18	400.18	200.09	400.18
Casing	11,715.37	11,715.37	5,857.68	5,041.05	5,041.05	2,520.52	5,041.05
Machinery and Tools	1,988.79	1,988.79	994.40	501.76	501.76	250.88	501.76
Drilling Tools	16,563.48	16,563.48	8,281.74	17,320.95	17,320.95	8,660.48	17,320.95
Totals	$ 32,098.79	$ 32,098.79	$ 16,049.40	$ 24,529.91	$ 24,529.91	$ 12,264.95	$ 24,529.91
Item 3. Depreciation of Equipment used for Production of Oil	$ 16,395.33	$ 16,395.33	$ 8,197.66	$ 32,511.50	$ 32,511.50	$ 16,255.75	$ 32,511.48
Item 4. All Expenses Paid by the taxpayer during the taxable year in connection with the production of oil (excluding the depreciation item No. 3)	$ 55,873.03	$ 49,897.50	$ 24,640.18	$106,559.47	$ 7,690.69	$ 32,741.01	$ 24,609.50
Total Deductions (Items 1, 2, 3 and 4)	$274,563.31	$353,810.11	$149,077.27	$209,949.82	$110,072.43	$100,751.88	$144,543.81
Net income from Property as determined by Respondent	$ 96,998.57	$ 53,125.13	$ 73,800.78	$ 16,402.70•	$ 22,424.91•	$ 65,327.94•	$ 90,715.67•
Depletion deduction as determined by respondent in computing the deficiencies	$ 48,499.29	$ 26,562.56	$ 36,900.39	$ —.—	$ —.—	$ —.—	$ —.—

(•) Indicate red figures.

[Title of Court and Cause—Docket Nos. 67179 and 73955.]

SUPPLEMENTAL STIPULATION OF AGREED FACTS.

In its income tax returns for the respective years in controversy, the petitioner claimed Items 1, 2, 3 and 4 as deductions from gross income in computing taxable net income, and the said items were allowed as deductions by the respondent in the determination of the taxable net income for the respective years in controversy.

During each of the years 1925, 1926 and 1927, petitioner made expenditures of the same character as those itemized in Schedule "A" under Item 1. In its tax returns for said years, petitioner deducted said expenditures in determining taxable net income; and the respondent, in his examinations of said returns, allowed said expenditures as deductions in determining taxable net income.

JOSEPH D. BRADY,
Counsel for Petitioner.
(Signed) HERMAN OLIPHANT,
Counsel for Respondent.

[Endorsed]: U. S. B. T. A. Filed at hearing June 24, 1936. [55]

[Title of Court and Cause—Docket Nos. 67179, 73955.]

Promulgated February 10, 1937.

In computing depletion of oil wells under the Revenue Act of 1928, the net income from the property, of which 50 percent is the limit of depletion, may not be reduced by the development expense which the taxpayer deducts in computing taxable net income.

Joseph D. Brady, Esq., for the petitioner.
Hartford Allen, Esq., for the respondent.

OPINION.

Sternhagen: These proceedings were submitted upon stipulations of facts. They present a single question of law in respect of deficiencies for 1929 and 1930, governed by the Revenue Act of 1928. In each the Commissioner, limiting the petitioner's depletion allowance in the case of oil wells to 50 percent of the net income from the property, as required by section 114(b)(3), has treated such net income as reduced by the undisputed development expenses which in the taxable years were taken by the taxpayer as deductions, consistently with an election made in earlier years. The petitioner contends that the net income from the property, 50 percent of which gauges the limitation of the depletion deduction, should be computed without the deduction for such development expenses. The provisions of section 114(b)(3), Revenue Act of 1928, and section 204(c)(2), Revenue Act of 1926, are

identical in language and, as to the 1926 Act, the petitioner's contention was completely sustained in Ambassador Petroleum Co. v. Commissioner, 81 Fed.(2d) 474, reversing 28 B. T. A. 868. If the present proceedings were controlled by the 1926 Act, that decision would be controlling and would, without more, require the reversal of the Commisisoner's present determinations. Mountain Producers Corporation, 34 B. T. A. 409 (on review, C. C. A., 10th Cir.).

But the Commissioner argues that the present cases are distinguishable from Ambassador Petroleum Co. v. Commissioner, supra, because [56] they arise under the 1928 Act and are therefore affected by article 221(i) of Regulations 74, in which the net income from the property, for the purpose of the 50 percent limitation on depletion, is required to be reduced by the amount of development expenses if they have been taken as a deduction in the determination of taxable net income. Thus the Commissioner, by virtue alone of his regulation, seeks an interpretation of the identical terms of the 1928 Act different from the authoritative judicial interpretation of such terms in the 1926 Act. This would give to his regulation a sanction greater than that of the adjudicated meaning of the same term. This is without support. To the contrary, if the meaning of the expression in the 1928 Act were not controlled by the adjudication under the 1926 Act, there would still be support for finding the same meaning in the 1928 Act because of the manifest legislative intention found in the House and Senate reports on the

1928 bill. These, like their predecessors, treat the term "net income from the property" in the depletion section as meaning operating income, a meaning which had been adopted in the administration of the statute. The court held also that reason leads to the same meaning. The Commissioner is without power to change this meaning by a regulation.

The Commissioner says that since the petitioner has elected to deduct its development expenses, the effect of this deduction must be treated as inherent in the election. The election, however, was made long before percentage depletion or its limitation was contemplated. Prior to 1926 the effect of the election was to establish a consistent practice as between deduction and capitalization of development expenses for the purpose of computing taxable net income of the year. This consequence of the election is still effective, but there is no equitable consideration which requires its expansion to reduce the depletion allowance, a consequence unthought of when the election was made.

It results that for years controlled by the Revenue Act of 1928, the taxpayer is entitled to have the 50 percent limitation of its depletion allowance computed upon the net income from the property without reduction by the amounts deducted by it in the taxable years as development expenses or the related depreciation.

Judgment will be entered under Rule 50. [57]

United States Board of Tax Appeals
Washington

Docket No. 67179.

WILSHIRE OIL COMPANY, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JUDGMENT.

Subsequent to the Board's report, 35 B. T. A. 450, promulgated February 10, 1937, the petitioner, acting under Rule 50, filed a proposed judgment of deficiency of $14,388.92. It appearing that there is no opposition thereto, it is

Ordered, Adjudged and Decided that there is a deficiency of $14,388.92 in income tax for 1929.

Entered Apr. 30, 1937.

[Seal] (Signed) JOHN M. STERNHAGEN,
Member. [58]

United States Board of Tax Appeals
Washington

Docket No. 73955.

WILSHIRE OIL COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT.

Subsequent to the Board's report, 35 B. T. A. 450, promulgated February 10, 1937, the petitioner acting under Rule 50, filed a proposed judgment of deficiency of $31,143.02, and the respondent thereafter filed a computation and a motion for judgment of a deficiency of $35,053.57. Entry of judgment was withheld to give petitioner an opportunity to present reasons against the respondent's proposed judgment. No objection being sbumitted, it is

Ordered, Adjudged and Decided that there is a deficiency of $35,053.57 in income tax for 1930.

Entered Apr. 30, 1937.

[Seal] (Signed) JOHN N. STERNHAGEN,
Member. [59]

[Title of Court and Cause.—Docket Nos. 67179 and 73955.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and Hartford Allen, Special Attorney for the Bureau of Internal Revenue, and respectfully shows:

I.

JURISDICTION.

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revnue of the United States, holding his office by virtue of are laws of the United States.

The respondent on review, the Wilshire Oil Company, Inc., (hereinafter referred to as the taxpayer) is a corporation organized under the laws of the State of California, with its principal place of business located at Los Angeles, California. The said Wilshire Oil Company, Inc., filed its income tax returns for the calendar years 1929 and 1930 with the Collector of [60] Internal Revenue for the Sixth District of California, whose office is located at Los Angeles, California, and within the judicial

circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

The Commissioner filed this petition pursuant to the provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II.

PRIOR PROCEEDINGS.

On June 1, 1932 and August 10, 1933, the Commissioner determined deficiencies in income taxes against the taxpayer for the years 1929 and 1930 amounting to $37,211.88 and $51,144.64, respectively, and sent by registered mail notices of said deficiencies in accordance with the provisions of Section 272 of the Revenue Act of 1928. Thereafter, and on July 28, 1932 and October 6, 1933, the taxpayer filed appeals from the said respective determinations with the United States Board of Tax Appeals, contesting the amount of the deficiencies determined by the Commissioner as aforesaid. The Commissioner filed his answers to the said respective petitions on August 19, 1932 and December 4, 1933, denying the allegations of error contained in said petitions.

Several issues were disposed of by stipulation of the parties and there remained a single issue for presentation to the Board.

The cases were tried before the United States Board of Tax Appeals on June 24, 1936.

On February 10, 1937 the Board promulgated its opinion and on April [61] 30, 1937 entered its decisions, wherein it was ordered and decided that there were deficiencies for the years 1929 and 1930 amounting to $14,388.92 and $35,053.57, respectively.

III.

NATURE OF CONTROVERSY.

The taxpayer is engaged in the business of producing oil and gas from various properties located in California. Under the provisions of Article 243 of Regulations 74, Revenue Act of 1928 (45 Stat. 791, c.852) the taxpayer deducted from the gross income of the respective properties (a) the exploration and drilling expenditures and (b) the depreciation on equipment used in drilling the wells. The items claimed were allowed by the Commissioner as deductions from gross income in computing the taxable net income for each of the years in controversy.

The question involved in the cases, stated generally, is the determination of the amount of depletion allowable as a deduction from gross income for each of the years in controversy, under the provisions of Section 114 (b)(3) of the Revenue Act of 1928 (45 Stat. 791, c.852). The said Section reads as follows:

> "(3) Percentage depletion for oil and gas wells:—In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable yead. Such allowance shall not exceed 50 per centum of the net income of the

taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

The specific question involved in the cases is whether in determining the net income from the properties for the purpose of computing the percentage depletion allowance under the limitation provisions of Section 114(b)(3), [62] supra, the taxpayer must consistently deduct from gross income the expenditures and depreciation, items (a) and (b) supra, as required by the provisions of Article 221 (i) of Regulations 74, Revenue Act of 1928 (45 Stat. 791, c.852).

The said Article states that the net income of the taxpayer, as computed without the allowance for depletion, "means the gross income from the sale of oil and gas less the deductions in respect to the property upon which depletion is claimed, including overhead and operating expenses, development expenses (if the taxpayer has elected to deduct development expenses), depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion."

The Commissioner contended that the controverted items must be deducted from gross income so as to arrive at a true net income figure upon which the percentage depletion allowance should be based. The Board, sustaining the contention of the taxpayer, held that the clause contained in Article

221(i) underscored, supra, was invalid and accordingly allowed the taxpayer to compute the percentage depletion allowance on a resultant excessive net income figure.

IV.

ASSIGNMENTS OF ERROR.

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion and final decisions rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in the said record, proceeding, opinion and final decisions so rendered and entered by the Board of Tax Appeals: [63]

1. The Board erred in holding and deciding that the provisions of Article 221(i) of Regulations 74, Revenue Act of 1928, were invalid.

2. The Board erred in holding and deciding that the taxpayer could disregard the exploration and drilling expenditures in computing the net income from its respective oil properties for the purpose of determining the percentage depletion deduction.

3. The Board erred in holding and deciding that in computing the net income from the various properties for the purpose of determining the percentage depletion deduction the taxpayer could disregard the depreciation sustained in connection with the drilling equipment used in the development of such properties.

4. The Board erred in holding and deciding that in computing the percentage depletion deduction with respect to the taxpayer's oil and gas properties under Section 114(b)(3) of the Revenue Act of 1928, the taxpayer is entitled to compute the 50 per cent limitation of its depletion allowance on the net income from the properties without reduction for development expenditures and related depreciation, which items were claimed and allowed as deductions from gross income in the computation of the taxable net income for the years in controversy.

5. The Board erred in failing to decide that in computing the percentage depletion allowance under Section 114(b)(3) of the Revenue Act of 1928, the taxpayer is not entitled to compute the 50 per cent limitation of its depletion allowance on the net income of the properties without reduction for development expenditures and the related depreciation, which items were claimed and allowed as deductions from gross income in the computation of the taxable net income for the years in controversy.

[64]

6. The Board erred in that its opinion and decisions are not supported by the evidence and are contrary to law.

7. The Board erred in failing to find all of the material facts.

8. The Board erred in failing to find any facts.

9. The Board erred in finding that there were deficiencies due from the taxpayer in the amounts

of $14,388.92 and $35,053.57 for the years 1929 and 1930, respectively.

10. The Board erred in failing to find that there were deficiencies due from the taxpayer for the years 1929 and 1930 in the amounts of $32,364.67 and $41,168.86, respectively.

Wherefore, the Commissioner petitions that the decisions of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with the law and with the rules of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd) JAMES W. MORRIS
Assistant Attorney General
(Sgd) MORRISON SHAFROTH
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:
HARTFORD ALLEN,
Special Attorney,
Bureau of Internal Revenue. [65]

United States of America,
District of Columbia—ss.

Hartford Allen, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read

said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) HARTFORD ALLEN.

Sworn and subscribed to before me this first day of July, 1937.

(Sgd) GEORGE W. KRIES
Notary Public

My commission expires Nov. 16, 1937.

[Endorsed]: U. S. B. T. A. Filed July 20, 1937.

[66]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Joseph D. Brady, Esq., 458 South Spring Street, Los Angeles, California.

You are hereby notfiied that the Commissioner of Internal Revenue did, on the 20th day of July, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decisions of the Board heretofore rendered in the above-entitled cases. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 20th day of July, 1937.

(Signed) MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revnue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 24 day of July, 1937.

JOSEPH D. BRADY,
Attorney for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed July 30, 1937.

[67]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: Mr. George L. Machris, President, Wilshire Oil Company, Inc., 2455 E. 27th Street, Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 20th day of July, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decisions of the Board heretofore rendered in the above-entitled cases. A copy of the petition for review and the

assignments of error as filed is hereto attached and served upon you.

Dated this 20th day of July, 1937.

(Signed) MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 26 day of July, 1937.

WILSHIRE OIL CO., INC.
By GEORGE L. MACHRIS, Pres.
Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed July 30, 1937.

[68]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries (Docket Nos. 67179 and 73955).
2. Pleadings:

(a) Petitions
(b) Answers to Petitions
(c) Amended Answer to Petition (No. 73955)
(d) Amendments to Petitions
(e) Answers to Amendments to Petitions.

3. Opinion promulgated February 10, 1937.
4. Decision (Docket No. 67179) entered April 30, 1937.
5. Decision (Docket No. 73955) entered April 30, 1937.
6. Petition for Review.
7. Notices of Filing Petitions for Review. [69]
8. Stipulation of Agreed Facts.
9. Supplemental Stipulation of Agreed Facts.
10. Praecipe for Record.

(Signed) MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 19th day of August, 1937, and is agreed to (J. D. B.).

(Sgd) JOSEPH D. BRADY,
Attorney for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Aug. 24, 1937.

[70]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 70, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 30th day of August, 1937.

[Seal] B. D. GAMBLE,
Clerk
United States Board of Tax Appeals.

[Endorsed]: No. 8656. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Wilshire Oil Company, Inc., a corporation, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed September 3, 1937.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Upon Petition to Review a Decision of the United States Board of Tax Appeals

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8656

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILSHIRE OIL COMPANY, RESPONDENT

No. 8655

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BANDINI PETROLEUM COMPANY, RESPONDENT

No. 8657

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILSHIRE ANNEX OIL COMPANY, RESPONDENT

It is hereby stipulated by and between the parties to the above entitled proceedings, that the same legal questions are involved in each of said cases and that the clerk of said Circuit Court of Appeals may print the record in the case of Commissioner v. Wilshire Oil Company, No. 8656, and may omit the printing of the record in the other two cases.

It is further agreed that the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Commissioner v. Bandini Petroleum Company, and Commissioner v. Wilshire Annex Oil Company shall abide by its decision in the case of Commissioner v. Wilshire Oil Company.

Dated: September 22, 1937.

JAS. W. MORRIS,
Assistant Attorney General.
JOSEPH D. BRADY,
Counsel for Respondents.

So ordered:

CURTIS D. WILBUR,
Senior U. S. Circuit Judge.

[Endorsed] Filed September 29, 1937. Paul P. O'Brien, Clerk.

79916—38

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, March 18, 1938

Before WILBUR, GARRECHT, and DENMAN, Circuit Judges

No. 8656

Order of submission

Ordered above cause argued by Mr. Ellis N. Slack, Special Assista to the Attorney General, counsel for petitioner, and by Mr. Josep D. Brady, counsel for respondent, and submitted to the Court f consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, April 1, 1938

Before WILBUR, GARRECHT, and DENMAN, Circuit Judges

No. 8656

Order directing filing of opinion and dissenting opinion, and fili and recording of judgment

By direction of the Court, ordered that the opinion and dissentin opinion this day rendered by this court in above cause be forthwit filed by the Clerk, and that a judgment be filed and recorded in th minutes of this Court in accordance with the majority opinio rendered.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8656. April 1, 1938

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILSHIRE OIL COMPANY, INC., A CORPORATION, RESPONDENT

Upon Petition to Review a Decision of the United States Board o Tax Appeals

Before WILBUR, GARRECHT, and DENMAN, Circuit Judges

DENMAN, Circuit Judge.

This is a petition by the Commissioner of Internal Revenue t review a decision of the Board of Tax Appeals which revised adversely to the Commissioner his determination of income tax deficiencies fo the years 1929 and 1930.

The taxpayer is a California corporation engaged in producing petroleum products from oil and gas leases in Southern California.

Pursuant to Section 23 of the Revenue Act of 1928, the taxpayer in its returns for the years in question deducted from its gross income an allowance for depletion on its oil and gas wells. The Commissioner assessed deficiencies based upon his ruling that that allowance was in excess of that permitted by statute.

The question before the Board and on this appeal concerns solely the interpretation of the phrase "net income" of an oil company under the depletion provision of the Revenue Act of 1928. The provision is (Sec. 114, (b) (3)):

"(3) PERCENTAGE DEPLETION FOR OIL AND GAS WELLS.—In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the *net income* of the taxpayer (computed without allowance for depletion) *from the property*, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph." [Italics supplied.]

The taxpayer, respondent oil company, in its return under the Act of 1928 of income for the years 1929 and 1930, computed the depletion of oil within three properties it owned and upon a leasehold, under a construction of the phrase "50 per centum of the net income of the taxpayer (computed without allowance for depletion from the property," that net income from the property meant net "operating income." It hence did not deduct the capital expenditure in drilling the wells which capital expenditure might yield it income for a score or longer pumping or flowing years. So computed, its 27½ percent of the gross income was less than 50 percent of the net, and hence the entire 27½ percent was allowable as a depletion.

The Commissioner claimed that the phrase, net income from the property, does not mean net "operating income" but means net income after also deducting the capital cost of the creation of the producing plant, i. e., the drilling and installing of pipes and structures necessary for pumping during the life of the well. Since 27½ percent of the gross income of the property exceeded 50 percent of the net income after the deduction of the capital development expense, the Commissioner allowed, as depletion only, this 50 percent of the net. His deficiency assessment increased the total taxable income of the taxpayer by the difference between the depletion as so computed and the computation of the taxpayer.

The phrase "net income from the property" has appeared in the depletion allowance provisions of the income tax act, first, in 1921,[1] and since then in three reenactments—1924,[2] 1926[3] and 1928.

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[1] Sec. 234 (a) (9) "• • • such depletion allowance based on discovery value shall not exceed the net income, computed without allowance for depletion, from the property upon which the discovery is made. • • •"

[2] Sec. 204 (c) "• • • but such depletion allowance based on discovery value shall not exceed 50 per centum of the net income (computed without allowance for depletion) from the property upon which the discovery was made. • • •"

[3] Sec. 204 (c) (2) "In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. • • •"

Under the 1921 Act, the Commissioner's depletion Regulation limited the deductions in determining the net income of the property to "operating expenses."[4]

When the provision was reenacted in 1924, the phrase "net income from the property" was defined by the report of the Senate Committee as "operating profit." It reads:

"The exception contained in subdivision (c) supersedes the second and third provisos of section 214 (a) (10) and 234 (a) (9) of the existing law. The existing law limits discovery depletion to the operating profit from the property upon which the discovery is made. The bill limits discovery depletion to 50 percent of the operating profit from the property upon which the discovery has been made."

Under the 1924 act the Treasury promulgated the same depletion regulation as for the 1921 act, i. e., confining the deductions to determine income from the property, i. e., "operating expenses."

We thus have the use of the phrase in the 1924 act determined by both the Treasury and the Congress as "operating" profit or income. It is admitted by the Commissioner that, at least until shortly before the 1928 reenactment of the percentage depletion clause, in all cases determining oil depletion by the percentage provisions, the clause was administered under a construction of the phrase "net income from the property" which excluded these capital development expenditures from the deductions determining such net income.

Congress reenacted the phrase in 1926 and the Treasury regulation repeated its limitation of the deductions to "operating expenses."[5]

When the 1928 taxing act here in question was passed, the law thus had been made plain that "net income from the property" means net "operating" income. We are thus required so to interpret the 1928 act under the rule reiterated by the Supreme Court in the recent case of Biddle v. Commissioner, decided January 10, 1938, 82 L. ed. 349, 354:

"Where the law is plain the subsequent reenactment of a statute does not constitute adoption of its administrative construction. Iselin v. U. S., 270 U. S. 245 * * *; Louisville & N. R. Co. v. U. S., 282 U. S. 740 * * *; Helvering v. New York Trust Co., 292 U. S. 455 * * *."

Though the Treasury for years so interpreted the phrase and administered the law, and though the Congress so fixed its meaning, the Commissioner claims that by a regulation under the 1928 act, that act no longer means what it meant when the Congress passed it. Instead of "operating" income, it has been transformed by the subsequent regulation into net income after the deduction of the capital

[4] "(b) Net income is the gross income from the sale of all mineral products and any other income incidental to the operation of the property for the production of the mineral products, less operating expenses, including depreciation on equipment, and taxes, but excluding any allowance for depletion. * * * Operating expenses, depreciation, and taxes on the property upon which the discovery is made, should be applied against the gross income from the same property on the basis of actual expenditures." Revenue Act 1921, Regulations 62, Art. 201 (b).

[5] "Less the deductions in respect to the property upon which the discovery is made including operating expenses, depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion." Revenue Act 1926, Regs. 69, Art. 201 (b).

item of expense in drilling and otherwise developing the well before its operation. This regulation claimed to overrule both the law as "plainly" established and the prior regulations is:

"This phrase 'net income of the taxpayer (computed without allowance for depletion)' means the gross income from the sale of oil and gas less the deductions in respect to the property upon which depletion is claimed, including overhead and operating expenses, development expenses (if the taxpayer has elected to deduct development expenses), depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion." Revenue Act 1928, Art. 221 (i), Regulations 74.

The Commissioner urges several arguments in support of this contention. The first is that the parenthetical phrase in the 1924 act and all succeeding acts, i. e.,:

"shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property."

by the exclusion of "depletion" from the allowable deductions, requires the inclusion in deductions of the capital development items. It is a sufficient answer to this argument that the phrase "(computed without allowance for depletion)" was in the act of 1924 when the Senate Committee recommended the legislation as basing the depletion allowance on "operating profit," and when the Treasury, following the Senate interpretation, confined its deductions to "operating expenses." It was in the 1926 reenactment of the depletion clause after both Senate and Treasury interpretation had excluded such capital expenditures from an income computation.

The next argument is that though the tax liability was incurred in the tax years 1929 and 1930, it was not governed by the plainly established meaning of the words "net income from the property" when the legislation was enacted in 1928, but by the contrary regulation, because two years later, in 1932, the Congress reenacted the depletion clause without change. It is a sufficient answer to this contention that when the tax liability was incurred the meaning of "net income from the property" was as plain as Congressional declaration and legislative approval of the Treasury's ruling could make it. Under the rule in Biddle v. Commissioner, supra, taxpayers in making their returns are entitled to rely upon the law as it then is. They are not required to have the prescience to discern a difference in Congressional viewpoint two years in the future. Penn Mutual Life Ins. Co. v. Lederer, 252 U. S. 523, 538. It may be hereafter argued that despite the rule in the Biddle case, and though net income from the property is plainly determined in the 1928 act, and the contrary regulation thereunder is now invalid, the reenactment of the phrase in 1932 should be regarded as an amendment of the 1928 act. However, this is a question we are not called upon to decide in a case involving taxes on income for 1929 and 1930.

Another argument is that, without change in its regulations, the Treasury's practice in 1927 was contrary to the plain and established

meaning of the words in the act of 1926, then controlling, and taxes were assessed for some months before the 1928 act with a capital deduction in depletion determination. The claim is that the Congress is deemed to have known of the practice is violation of its declared interpretation and ratified it in the reenactment of 1928.

We have searched the record in vain for any proof of such a claimed practice. Much less is there anything within or without the record suggesting that Congress knew of such a practice. It certainly is not proved by attempting to have us consider the claimed "General Counsel's Memorandum" 2315, published September 25, 1927, in which that counsel gave his unsolicited opinion, in effect that the Congress and the Treasury were wrong when they interpreted net income as net "operating" profit or income. The Commissioner's brief here lacks the candid admission of his brief in the case of Ambassador Petroleum Co. v. Commissioner, 81 Fed. (2d) 474, where he stated:

"The Commissioner's interpretation was embodied in a General Counsel's Memorandum, which, together with I. T.'s and other informal rulings does not have the force or effect of Treasury Decisions and does not commit the Department to any interpretation of the law. See cautionary notice published in the Internal Revenue Bulletins; also Helvering v. New York Trust Co. 292 U. S. 455."

The New York Trust Company case clearly shows that such a memorandum opinion is evidence neither of a practice following the recommendation or of notice to us or the Congress of such a practice. Nothing is shown here but the ipse dixit of the brief. The taxpayer is as much entitled to proof of the practice as the government is of proof of facts of the claimed deductions.

Another argument is that although it is plainly established that the net income from the oil property of the depletion clause of the act is "operating" income, that plain interpretation by the Congress and the Treasury is wrong because a regulation affecting calculations entirely different from the depletion, gives the anomalous option to the taxpayer to deduct his capital development expenses in computing his entire income from all sources.* Without considering that the exercise of this option ties the taxpayer in all future years to its exclusive use, the argument is made that since the regulation permits the taxpayer to apply inconsistent methods of computation which in a particular tax year may be to his benefit, therefore the Congressional intent, plainly determining the depletion allowance, is wrong.

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*Treasury Regulations 74, promulgated under the Revenue Act of 1928:

"ART. 243. Charges to capital and to expense in the case of oil and gas wells.

Such incidental expenses as are paid for wages, fuel, repairs, hauling, etc., in connection with the exploration of the property, drilling of wells, building of pipe lines, and development of the property may at the option of the taxpayer be deducted as a development expense or charged to capital account returnable through depletion. If in exercising this option the taxpayer charges these incidental expenses to capital account, insofar as such expense is represented by physical property it may be taken into account in determining a reasonable allowance for depreciation. The cost of drilling nonproductive wells may at the option of the operator be deducted from gross income as a development expense or charged to capital account returnable through depletion and depreciation as in the case of productive wells. An election once made under this option will control the taxpayer's returns for all subsequent years. * * *"

It is a sufficient answer to this contention that when the Congress decided, in 1925 and 1926, that the depletion allowance was calculable on an operating profit basis, the anomalous regulation allowing the deduction of capital expenditures from gross general income was in effect. When the "operating" depletion rule received Congressional recognition and approval, the Congress knew the taxpayer had the right to compute his total net income by deducting capital oil development expenditures from his gross income. Nevertheless it based the depletion allowance on net operating income. In this case, the Oil Company, by its election in 1924, had bound itself to deduct its capital development expense in determining its total net taxable income, and omit such capital expenditures from its capital account, for all time in the future under the provision of the regulation that, "An election once made under this option will control the taxpayer's returns for all subsequent years."

A further answer is that, while by the regulation we have the inconsistency of deducting capital expenditures from general gross income, and not deducting them in net income from a particular oil property, which may be advantageous to the taxpayer in a particular tax year, the Government may gain greatly in the future by the requirement that the taxpayer must always thereafter omit his capital development expenditures from his capital account. The fact that the regulation compelled such future accounting, implies that the Treasury contemplated such a beneficial result to its revenues.

The regulation requiring the capital development expenditures to be deducted from current income instead of being capitalized, is not tied to any method of depletion or depreciation. Hence it may well be that over a period of years the loss of tax by a total deduction in the year of expenditure will be more than compensated by the facts (a) that gross income from oil production will increase with the increased price due to inevitable depletion of the world's supply, and hence the income come within the higher percent brackets; (b) the tax brackets of future legislation will be much higher and (c) depreciation and (d) depletion deductions much less, without the capital development expenditures in the amount on which these future items are calculated.

That the tax rates will increase and deductions will become more scant is not a mere fanciful conjecture. The Supreme Court has given warning of this in its recent case of Helvering v. Mountain Producers Corporation, decided March 7, 1938, where it was pressed to reconsider (and overrule) prior decisions because of the "expanding need [for revenue] of State and Nation." In successive years the rate of taxation on corporate income has increased, and pending bills show the corporate burden certain of continuing future increase.

That the world supply of petroleum is limited and that rising prices for oil and gas will inevitably ensue is recognized both by the Government and the industry.

That the Congressional allowances for depletion are shrinking is shown by the 1924 act reducing the 100 percent of the net of the 1921 act to the 50 percent of the net as the maximum, and 2 years later by the 1926 act allowing the 27½ percent of the gross receipts, only if it did not exceed 50 percent of the net.

It is therefore apparent that the regulation creating the anomaly of allowing in a particular first year the capital development deductions from general gross income, tied to a compulsion to follow this method in future years, affords no argument that the Congress was wrong when it plainly made the depletion deduction computable on net "operating" income and hence did not require a "net" after deduction of capital development expenditures.

The fact that the 1926 and 1928 act may be construed as also permitting a computation of full actual depletion,[7] as an alternative to the percentage method, adds nothing to the Commissioner's argument. The added alternative may be revoked at any time. It does not affect the bargain with the taxpayer on an entirely different matter, i. e., the perpetual future deduction of capital development expenditures from gross income.

The double deduction argument has weight only when excluding these necessary future effects of the regulation on which it is based. The Commissioner's brief, failing to mention the above matters fully considered in our opinion in Ambassador Petroleum Co. v. Commissioner, supra, much less to attempt to distinguish or overcome them, is not persuasive to a court in which the Commissioner seeks an overruling of that case.

Affirmed.

WILBUR, Circuit Judge, dissenting:

I dissent. I adhere to the view expressed by me in the dissenting opinion in Ambassador Petroleum Co. v. Commissioner of Internal Revenue, 81 F. (2d) 474, 483. Notwithstanding that, in view of the majority decision in that case, I would concur in the result in the case at bar on the theory that the language of § 114 (b) (3) of the Revenue Act of 1928 is not sufficiently clear to justify a reconsideration of the decision in Ambassador Petroleum Co. v. Comm'r., supra, and that, therefore, the parties should be left to their remedy in the Supreme Court. If I agreed with my brethren that the meaning of the statute involved was entirely clear, I would also agree with their conclusion that the new rule of the Commissioner under the Revenue Act of 1928 could not change the plain language of the statute. However, the statute expressly requires the Commissioner to adopt rules for the determination of the depletion allowance. He has done so. Under those rules so adopted the additional tax determined by the Commissioner accrued. To uphold the tax under the new rule is not inconsistent with the decision of the court in Ambassador Petroleum Co. v. Comm'r., supra. Because of the changed situation

[7] "In no case shall the depletion allowance be less than it would be if computed without reference to this paragraph." Act 1928, Sec. 114 (b) (3).

it is not necessary to overrule that decision in order to reverse the decision of the Board of Tax Appeals herein.

[Endorsed:] Opinion and Dissenting Opinion. Filed Apr. 1, 1938. As amended by order of April 8, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8656

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILSHIRE OIL COMPANY, INC., RESPONDENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals

This cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed:] Filed and entered April 1, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, April 8, 1938

Before WILBUR, GARRECHT, and DENMAN, Circuit Judges

No. 8656

Order directing amendment of opinion

By direction of Garrecht and Denman, Circuit Judges, ordered that their majority opinion heretofore rendered by this court in above cause be forthwith amended pursuant to memorandum filed.

United States Circuit Court of Appeals for the Ninth Circuit

No. 8656

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILSHIRE OIL COMPANY, INC., A CORPORATION, RESPONDENT

Ordered that the opinion be amended as follows:

At page 7 of the printed copy, line 18, substitute 1925 for 1924.

On page 8 of the printed copy, strike out the last paragraph complete on that page and substitute for it the following:

That the Congressional allowances for depletion are shrinking is shown by the 1924 act reducing the 100 percent of the net of the 1921 act to the 50 percent of the net as the maximum, and two years later by the 1926 act allowing the 27½ percent of the gross receipts, only if it did not exceed 50 percent of the net.

FRANCIS A. GARRECHT,
United States Circuit Judge.
WILLIAM DENMAN,
United States Circuit Judge.

[Endorsed:] Order re amendment of opinion. Filed April 18, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the Revised Rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-seven (87) pages, numbered from and including 1 to and including 87, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Robert H. Jackson, Solicitor General of the United States, counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23rd day of June A. D. 1938.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

Supreme Court of the United States

October Term, 1938

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILSHIRE OIL COMPANY

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BANDINI PETROLEUM COMPANY

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILSHIRE ANNEX OIL COMPANY

Stipulation

It is hereby stipulated and agreed by and between the parties to the above-entitled proceedings that the same legal questions are involved in each of said cases and arise upon facts which are identical in all material respects.

Therefore, it is stipulated and agreed, subject to the approval of this Court, that only the record in Helvering v. Wilshire Oil Co. need be printed, that the records need not be printed in the other two cases; and that if the petitions for writs of certiorari be granted in the three above-entitled cases that records need not be printed nor briefs filed in Helvering v. Bandini Petroleum Co. and Helvering v. Wilshire Annex Oil Co.; that briefs be filed and oral argument presented only in Helvering v. Wilshire Oil Co., and that the decisions in Helvering v. Bandini Petroleum Co. and Helvering v. Wilshire Annex Oil Co. shall abide the decision of this Court in Helvering v. Wilshire Oil Co.

ROBERT H. JACKSON,
Solicitor General.
JOSEPH D. BRADY,
Counsel for Respondents.

JUNE 1938.

U. S. GOVERNMENT PRINTING OFFICE 1938

Supreme Court of the United States

No. 1, October Term, 1939

Order allowing certiorari

Filed April 3, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1939